

appellant was entitled to deduct the \$82,300 from the purchase price collected by respondent in respect of the ten (10) lots of land referred to in the order dated May 15, 1978. In his judgment the learned judge stated:—

"On the affidavit evidence filed herein I am satisfied that the debtor did agree through his advocates, Reddi & Co., Kuching, that the purchase price of \$263,300 or thereabout was to be used to pay off the judgment debt of \$238,361.49. However I am unable to find any satisfactory evidence whereby the debtor had given express consent to the creditor to deduct this alleged debt of \$82,300 from the said purchase price."

The learned judge was perfectly right to hold that appellant had no right to deduct this sum from the purchase price. Further, it was clear from respondent's affidavit that he was disputing the right of appellant to claim this sum on the ground of limitation. In respect of the \$97,500 Lee Teck Choon admitted owing this sum for buying the 3 houses from respondent. He never disputed owing this sum of money to respondent. Because appellant could not deduct the \$82,300 from the purchase price appellant is now saying that the \$97,500 cannot be set off. Appellant tried to impress upon us that Lee Choon Teck was not the appellant. But, it was never explained to us how was it possible for appellant to accept set off of \$97,500 if respondent agreed to deduct \$82,300 from the purchase money. The only acceptable explanation is Lee Choon Teck's part in the whole affair. He ran the appellant company as if it were his own concern. If appellant and respondent were concerned only there would be no problem. Lee Choon Teck in his capacity as managing director is now renegating the position he previously accepted. If in his capacity as managing director he agreed to accept \$97,500 from himself in his personal capacity in settlement of appellant's debt what is there to stop the set off? The answer is the \$82,300. If respondent would agree to allow deduction of \$82,300 then appellant would agree to the set off of \$97,500. Actually, appellant had nothing to do with either of these two sums except for Lee Choon Teck, who, on the one hand, asked respondent to build houses for him in his personal capacity and on the other hand permitted respondent to get materials from appellant to build those houses in his capacity as managing director of appellant company. So very much depended on which cap he was putting on at the time. If I may use a crude expression he chose his cap to suit the occasion most favourable to him.

There is no challenge to the learned judge's following finding that:—

"Since the creditor had collected a total sum of \$265,800 or \$263,300 by way of purchase price from the sale of 10 lots of land, and in the absence of any evidence to the contrary, I would be prepared to rule that at the time when the Bankruptcy Notice dated July 11, 1979 was issued, the judgment debt vide Civil Suit No. K. 119/77 must be deemed to have been fully discharged and satisfied."

Unless there was a prior arrangement between the parties appellant could not deduct the \$82,300 from the purchase price. The learned judge had found no evidence of such arrangement. We see no reason for interfering with his finding. Accordingly, we would dismiss the appeal with costs. Deposit to respondent against taxed costs.

Appeal dismissed.

Solicitors: *Ee & Lim; Reddi & Co.*

SYARIKAT JENGKA SDN. BHD. v. ABDUL RASHID BIN HARUN

[F.C. (Raja Azlan Shah C.J. (Malaya), Syed Othman & Salleh Abas F.J.) June 8 & September 19, 1980]

[Kota Bharu — Federal Court Civil Appeal No. 133 of 1979]

Tort — Conversion — Failure to prove existence of object of tort of conversion.

Practice and Procedure — Preparation of appeal records — Unnecessary documents included — Costs.

Evidence — Admissibility of documents — Maker not called — Public documents — Documents not kept in ordinary course of business — Photostat copies — Evidence Act, ss. 32, 74, 78.

In this case the respondent, a timber logger, claimed that the appellant a logging company had removed and converted to its use 700 tons of timber belonging to the respondent. He sued the appellant for compensation for the loss of the timber. The appellant denied the allegation and made a counterclaim for the amount of royalty and fees alleged to be paid by him. The learned judge of the High Court gave judgment in favour of the respondent and dismissed the counterclaim for royalty. The appellant appealed.

Held: (1) on the evidence it had not been proved that the respondent did have 700 tons of timber logs kept at the log yards prior to the stoppage of work as alleged by him. The document relied upon by the respondent purported to be a record of timber extracted from the scheme and was written by his son who had since died. This document was inadmissible as there was no evidence to show that it was kept in the ordinary course of business or that it was an entry in a book of records regularly kept in the course of business. Moreover the tonnage written therein far exceeded 700 tons, which the respondent claimed to have been stolen by the appellant;

(2) as the goods which are an important element of the tort of conversion were not proved to have existed, the appellant could not be said to have removed them and converted them to its use and judgment should have been given in favour of the appellant;

(3) the respondent's own evidence showed that the theft of his timber occurred before he was requested to stop work, as the reason for the request was to enable investigation to be carried into the suspected theft of rubber;

(4) no conclusion could justifiably be reached that the appellant removed the respondent's timber. The inherent contradictions and improbability of the testimony of the respondent and the documentary evidence, all go to dispute the respondent's case;

(5) in respect of the counterclaim for royalty payments the appellant relied on documents which were photostat copies and as no explanation was given as to why the originals could not be produced, they were inadmissible and the counterclaim was rightly dismissed.

Cases referred to:

- (1) *Miller v. Babu Madho Das* (1895-6) 23 I.A. 106, 116.
- (2) *Bhagat Ram v. Khetu Ram & Anor.* A.I.R. 1929 P.C. 110, 112.
- (3) *Ooi Soon Eng v. Ng Kee Lin* [1980] 1 M.L.J. 26, 68, 29.
- (4) *Chow Yee Wah v. Choo Ah Pat* [1978] 2 M.L.J. 41, 44.

FEDERAL COURT.

Mohamed Ismail for the appellant.

Joseph Au for the respondent.

Cur. Adv. Vult.

Salleh Abas F.J. (delivering the judgment of the Court): In this case the respondent, a timber logger claimed that the appellant, a logging company had removed and converted to its use 700 tons of timber belonging to the respondent. He sued the appellant

for compensation of \$110,000 for the loss of these timber logs, plus interest at 6% per annum from the date of the conversion and cost of the suit. The appellant denied the allegation and in addition thereto made a counterclaim against the respondent for a total sum of \$24,669.25 which was made up of two amounts \$18,862.25 being the amount of royalty and \$5,807 being the amount of Forest Department closing fee. The trial took place before Mr. Justice Abdul Razak who gave the judgment in favour of the respondent and hence this appeal.

The question involved in this appeal is whether the conclusion reached by the learned judge is justified by the evidence before him.

The appellant holds a timber concession covering a vast area of jungle land in Jengka Pahang. It also has a sawmill in the area for processing its own timber. The timber area is divided into several smaller areas, each known as a scheme. The appellant first fell and removed the timber standing in each of these schemes and thereafter contracted it out to timber loggers to fell and remove the remaining timber. For the purpose of this appeal there are three relevant schemes, i.e. schemes 20, 21 and 17. Both schemes 17 and 20 were previously worked areas (known as K.S.K. area). Scheme 20 was divided into four blocks: blocks A, B, C and D. The respondent was given a logging contract on November 20, 1973 to clear up scheme 20 block A. Under the term of the contract he was given three months to complete the logging work which was to be commenced only after he had the necessary permission to do so from the appellant. It was also agreed that the appellant would not be responsible for any loss incurred by the respondent. The respondent also had a contract for scheme 17, whilst at the material times the appellant was working in scheme 21. Although scheme 20 and scheme 21 are adjacent to each other, the distance between the entrances to these two schemes by road is some 15 miles and it takes three-quarters of an hour for a logging machine to cover that distance. All timber logs to be taken out of the schemes, whether to a destination outside Jengka or even to the appellant's sawmill in Jengka itself had to pass through a forest checking station, where the logs were measured for the purpose of determining their volumes, quantities and duties. After this was done forest removal passes would be issued by the forest guard-in-charge of the station. The passes would record the measurements of the logs, the quantities, the duties paid on them, the licence numbers of the vehicles carrying the logs and also the licence number of the logging permits in respect of the logs. Only after these passes were issued would the logs be permitted to pass out of the checking station.

In this evidence the respondent said that he started to work in scheme 20 block A in December 1973 and about one month later on January 14, 1974 the appellant through its employee, named Annuarul bin Mat Perai made an oral request to him to stop the logging work in the scheme because people were stealing timber. He said he complied with the request and stopped work for a month. By the time he had stopped work he had already felled 700 tons of timber and had

them kept at a log yard in the scheme. During the stoppage he returned to the scheme and there discovered that the logs were missing. He alleged that he saw the appellant's employees under the charge of one Kadir engaged in extracting and removing his timber to the appellant's sawmill in a lorry belonging to the appellant. He followed the lorry half-way. Later he had a word with the appellant's manager, who denied that the appellant had taken his timber. He then sought the assistance of Encik Ramli, District Forest Officer, Temerloh who according to the respondent said that he could not do anything about the theft. He wrote three letters on April 15, 1974, May 9, 1974 and May 31, 1974 to Encik Ghaffar bin Baba who was then Minister of Rural Development complaining about the missing timber logs. On September 2, 1974 his solicitor wrote a letter to the appellant asking for a compensation of \$110,000 for the missing logs, or a civil suit would be commenced. The writ was finally issued on November 25, 1974. At this juncture it is interesting to note that the respondent wrote no letter to the appellant about the stoppage of work and the missing logs, nor did he even lodge a police report despite the theft which he had personally seen. He claimed that he had discussion with the appellant's manager twice and that he went to see "Syarikat Jengka people every now and then for about fifteen times to find out when he could resume work."

The appellant led evidence denying that it did ask the respondent to stop work or remove and convert the respondent's logs to its use. By documentary evidence, namely the delivery orders P4 and the forest removal passes D5 the appellant contended that whatever timber extracted from scheme 20 block A were all taken out of the scheme by the respondent himself. P4 shows that the timber logs were taken out by the respondent or his agent and D5 is the relevant forest removal passes authorising such removal. These documents therefore completely negative the allegation of theft against the appellant. However, the respondent claimed that the delivery orders P4 relate to the logs extracted from scheme 17 only and that the removal passes D5 are false because there was a collusion between the appellant's officer and the forest officer who issued them. There were 531 forest removal passes altogether covering the period during which the respondent alleged that he stopped logging work in the scheme — between January 15, 1974 and February 14, 1974.

In determining this appeal, we feel that the case should be examined in the light of the following questions, viz.:—

- (1) Whether the respondent had actually logged and kept 700 tons of timber logs at the log yard;
- (2) Whether the respondent was asked to stop the logging work;
- (3) Whether the respondent did stop the logging work;
- (4) Whether the appellant removed the timber logs of the respondent; and
- (5) Whether the forest removal passes were false.

If the answers to questions (1), (4) and (5) are in the

affirmative the findings of the learned judge would be justified; otherwise it is open to question.

(1) *Whether the respondent had logged 700 tons of timber and kept them at the log yard prior to the stoppage work on January 15, 1974?*

The respondent in his examination-in-chief said that by that time he had already felled 700 tons of timber and had them kept at 4 log yards in the scheme. Under cross-examination he produced a four-page document P3 purporting to be the record of timber extracted from the scheme written by his son who had since died. The learned judge relied very heavily on this document to make a finding against the appellant.

Here we agree with counsel for the appellant that the Exhibit P3 is inadmissible, and even if admissible it proves nothing. Its author having been proved to be dead — there is no evidence to show that P3 is a statement made in the ordinary course of business of the respondent or part of an entry in a memorandum or book kept in the ordinary course of his business so as to satisfy the requirement of paragraph (b) of section 32 of the Evidence Act. Nor is there any evidence to prove that P3 is an entry in book of accounts regularly kept in the course of the respondent's business under section 34 of the Evidence Act. It is true that during the course of the trial objection as the admissibility of P3 was raised on an erroneous ground, and that it was not taken at an appropriate time; but these factors do not affect the inadmissibility of the exhibit. It was decided long ago by the Privy Council that an erroneous omission to object to admission of a document which was inadmissible did not make it relevant and so the document could be disregarded entirely (*Miller v. Babu Madho Das*⁽¹⁾). On the other hand where the document was admissible, lack of objection in the trial did not render it inadmissible (*Bhagat Ram v. Khetu Ram & Anor.*⁽²⁾).

Exhibit P3 consists of four pages containing statistics of timber of various descriptions. The first page records 18,872.6 tons, second page 20,535.4 tons, third page 11,887.6 tons and the fourth page 21,574.1 tons, thus giving a grand total of 72,869.7 tons in all. Any one of these figures either taking singly or together is certainly far in excess of 700 tons which the respondent said that he had felled before he stopped work. Without any evidence to show whether the 700 tons were included in P3 and without any explanation how these were to be ascertained, P3 is worthless as it proves nothing. We therefore hold that the respondent's contention that he had felled and kept at his log yards 700 tons of timber was not proved. Even his solicitors' letter (A10) written to the appellant on September 2, 1974 did not support him at all. In this letter his solicitor alleged that the appellant extracted 700 tons of timber logs and removed them to its mills. Whereas in his evidence the respondent did not accuse the appellant of extracting the timber but of removing timber logs which had already been extracted and kept at the log yard. There is thus a serious contradiction as to what the appellant was accused to have removed.

In our view this contradiction shows that the respondent did not have 700 tons of timber logs kept

at the log yards prior to the stoppage of work as claimed by him. As goods, which is an important element of the tort of conversion, are not proved to have existed the appellant could not be said to have removed them and converted them to its use, and should have therefore been entitled to the judgment. However, in fairness to the respondent, we proceed to examine other questions as well.

(2) *Whether the respondent was asked to stop the logging work?*

The respondent testified that one Annuarul bin Mat Peria an ex-employee of the appellant on January 14, 1974 asked the respondent to stop work and accordingly he stopped work on the following day. Annuarul had left the employment of the appellant and so was not asked to give evidence. The learned judge accepted the evidence of the respondent because he thought that Annuarul should have been called to rebut the respondent's evidence. It is therefore necessary to examine the evidence given by both parties on this particular point in order to determine whether the situation called for the rebuttal.

The respondent relied upon the appellant's instruction (A6) to its security guards as a corroboration to support his evidence that he was requested to stop work. This instruction dated January 15, 1974, however, merely required the security guards to maintain strict check and control upon the movements of traffic in and out of the scheme. It said nothing about stoppage of work, nor did it contain anything which could give rise to any implication that the logging work was required to be stopped. On the contrary an inference could be drawn from such strict check and control that the purpose of the instruction was to detect and prevent thefts of timber logs in the scheme. Such purpose in our view is borne out by the evidence of the respondent himself who said that Annuarul had asked him to stop work because he (Annuarul) suspected that people had been stealing timber in the block A of scheme 20 (the respondent's own area) and he wanted to investigate into the thefts. If this statement is true, it means that thefts of his timber logs had occurred before the respondent had even started work. In view of the fact that under the logging contract the appellant would not be responsible for any loss incurred by the respondent (see paragraph 3(g) of the contract) one may wonder whether the allegation of request to stop work was not made in order to provide a ground for shifting the liability to the appellant. Such a conclusion does not seem to be unreasonable.

Thus not only is the evidence of the respondent self-contradicting and unsupported by the instruction to security guards, it is also contradicted by the evidence of DW1 and DW2. Both these witnesses who gave evidence for the appellant denied that the appellant ever requested the respondent to stop work. DW1 was the secretary and financial controller of the appellant and DW2 was the appellant's logging supervisor. There seems to be no reason at all why their evidence should be rejected. Thus in our view the situation did not call for the rebuttal of the respondent's evidence necessitating the calling of Annuarul. By itself

the respondent's evidence is self-contradicting and unsupported. The denials by DW1 and DW2 render it completely worthless.

(3) *Did the respondent stop work?*

The respondent said that he stopped work on January 15, 1974 for a month until he resumed it on February 13 or 14, 1974. To corroborate his evidence he called two witnesses. PW3, a bulldozer driver employed by the respondent said that in compliance with the respondent's instruction he did not work in scheme 20A between January and March 1974. This evidence is certainly contradicting that of the respondent as to the length of stoppage of work. According to the respondent by February 13 or 14 work was already resumed, whereas this witness seems to say that at that date the work was still not resumed. PW3 also said that during the stoppage, the bulldozer was left idle in the scheme. This evidence is rather remarkable because it is hard to believe that such an expensive machine like bulldozer, whose rental is so high should be left to rot in the jungle without being put to productive use. However, the question of belief is entirely for the learned trial judge, but one would expect him to take this factor into consideration when dealing with PW3's evidence.

PW4, a chain-saw operator cum land rover driver employed by the respondent said that he felled timber in scheme 20A from the middle of December 1973 to the middle of January 1974 and that in obedience to the respondent's instruction he did not work in this scheme from the middle of January to the middle of March 1974 and that during this period he worked as a land rover driver in the respondent's scheme 17. Again this witness's evidence is contradicting that of the respondent as to the length of stoppage of work and the date of its assumption. Whilst PW3 and PW4 swore that the stoppage of work lasted for two months and that it was resumed in the middle of March 1974, the respondent on the other hand mentioned that the stoppage was for one month and that the work was resumed in the middle of February 1974. This contradiction does not seem to be taken into consideration by the learned judge in assessing the evidence of PW3 and PW4. In any case this evidence is too vague to be reliable.

According to the letter of the respondent's solicitor, dated September 2, 1974, the respondent stopped work on December 15, 1973, but in his evidence the respondent said that he only began to work on December 15, 1973 and that he stopped work only a month later. Does this mean that he was asked to stop even before he started to work? If so, how could he fell 700 tons of timber which he alleged to have been stolen by the appellant? This contradiction leads to absurdity and is clearly indicative that the respondent was neither asked to stop work, nor did he stop it.

It is to be remembered that under the logging contract the respondent was required to complete the work within three months of its commencement. There is nothing in the evidence to show and the parties varied this term of the contract. There is also no reason at all why the appellant should want the work

A to be delayed by ordering the respondent to stop in the middle of it.

The respondent's contention is far from being supported by evidence in view of the contradiction between his own evidence and that of PW3 and PW4 and the letter of his solicitor. The circumstances relating to the leaving of bulldozer idling in the jungle and the term of the contract requiring him to complete the logging work within three months raise further doubt as to the reliability of his evidence.

(4) *Did the appellant remove the respondent's timber logs?*

The respondent's evidence alleging that the appellant removed his timber logs seems to self-contradicting. At one stage he said that after the stoppage of work he returned to the scheme only to discover that the logs were missing, thereby implying that he did not see who removed his logs. Yet at a later stage he claimed that he saw the appellant's employees under the charge of one Kadir loading his logs on to the appellant's lorry and transporting them to its mills and that he followed the lorry half-way. This evidence seems to be completely unreliable because despite what had been seen, as claimed by him, he said that he did not get the impression that they were stealing his logs. This self-contradiction clearly shows that he did not see what he claimed to have seen.

Paragraphs 6 and 7 of his statement of claim in effect said that after he was informed by the appellant to resume work in March 1974, he returned to the scheme only to discover that the logs were missing. The statement charged the appellant with having removed the same. This statement differs completely from his evidence. In the evidence, the work was resumed on or about February 14, but in the statement it was resumed in March. In the statement also he never said that he saw the appellant's employees removing the logs. He simply charged the appellant with removing the same for no other reason than that the logs were found to be missing.

Another circumstance which weighs heavily against the respondent is that he lodged no police report at all regarding the so-called theft of his timber logs. As an excuse for not reporting the matter to the police he said that he saw the appellant's officials 15 times and also wrote 3 letters to Encik Ghaffar bin Baba, the former Minister of Rural Development. When questioned further on his 15 times seeing the appellant's officials, he only said that the purpose was to find out when he could resume work. He raised no issue about the theft nor enquired into the circumstances of the disappearance of his timber logs. The three letters which he wrote to Encik Ghaffar bin Baba simply asked for the good offices of the ex-Minister to persuade the appellant to give him a new logging contract for scheme 22 as a compensation for the loss of his timber logs, which he alleged were removed and sold by the appellant. These letters certainly do not form an independent corroboration for the respondent's evidence alleging that the appellant stole his timber logs.

To support his allegation the respondent relied upon the evidence of PW2. This witness was an ex-

employee of the appellant, who was dismissed for absence from work without leave. Undoubtedly he was an embittered witness. This witness testified that whilst still in the employment of the appellant at the instance of the appellant he removed the respondent's timber logs in scheme 20 between January and March 1974. If what PW2 said is true, he could not have worked for the appellant during January and March, because he was already dismissed from the appellant's employment in the middle of January 1974, and before that date he was on leave. Further according to the respondent he discovered the logs missing when he resumed work on February 14, 1974, thereby implying that by that date the logs were completely removed by the appellant. If PW2 said that he was still removing the logs on behalf of the appellant in March, he must have been plainly lying. The respondent claimed that Annuarul ordered him to stop work and that Kadir was in charge of removing the logs. Yet PW2 said nothing about these two employees of the appellant. He did not say who had asked him to remove the logs. If it was Annuarul or Kadir who had asked him to do so, why did he not say so? Further if the work of removing the logs was under the charge of Kadir, one would expect PW2 to mention Kadir. Yet nothing was said by him about Annuarul and Kadir.

PW2 was a skidder operator. The skidders at the material times were not in scheme 20, but in scheme 21. It is thus incredible how PW2 could say that he operated the machine in scheme 20 when they were proved to be elsewhere.

Thus having regards to all these contradictions it would appear that the circumstances do not justify a finding that the appellant removed the respondent's timber logs at all.

(5) *Whether the removal passes are false?*

Earlier in our judgment we made a brief reference to delivery orders P4 and forest removal passes D5. The delivery orders P4 relate to the logs which were taken out by the respondent from Jengka to various buyers and destinations outside Jengka. The delivery orders exhibited in court are 212 in number and cover a period between December 1, 1973 and April 27, 1974 (pages 123-332) of which 27 were issued in a period between January 15, 1974 and February 14, 1974, i.e. the period during which the respondent alleged that he had stopped logging work. Each delivery order contains (1) its own serial number; (2) the date of the issue; (3) the name and address of the person or firm to whom the logs were delivered; (4) the registration number of the vehicle carrying the logs; (5) the number of logs and descriptions of timber; (6) measurements in cubic feet; (7) Government due; (8) the removal pass number and (9) the signature of person taking the delivery. From the removal pass number one could ascertain from which scheme the timber logs stated in the delivery order came, because the removal pass itself contains the number of the logging licence relating to each particular scheme. It is beyond dispute that the respondent's logging licence for scheme 20 block A is T.T.11/73(K.P.) and his licence for scheme 17 is T.T.2/73(K.P.) — (see evidence of DW4, Mokhtar bin Mat Isa, Deputy Forest Officer,

A Temerloh at page 43E). All removal passes were issued by the officer-in-charge of forest checking station through which the timber logs were taken out of the area. Without these passes no logs could be taken out at all. All removal passes pertaining to logs taken under licence T.T.11/73(K.P.) and therefore from scheme 20 block A were exhibited in court. These are contained in 4 large volumes, each volume containing about 400 pages and marked as Exhibit D5. The list of these passes is also exhibited and marked as D6. There were a total of 1452 removal passes covering the period between January 1, 1974 and March 7, 1974 and these were included in these four volumes. Of these there were 531 passes issued during the period of suspension of logging work as claimed by the respondent i.e. between January 15, 1974 and February 14, 1974. Most of these passes except a few correspond with the delivery orders of the relevant period.

The delivery orders and removal passes if accepted, would have been a complete defence to the respondent's claim as a conclusion can be drawn from them that the respondent himself had removed the logs from scheme 20 block A, and that he did not stop logging work during the relevant period. The respondent accepted that the delivery orders P4 were genuine but the logs described therein came from scheme 17. He claimed that the corresponding removal passes D5, whose numbers were noted on the delivery orders were false as there was a collusion between the forest officer who issued the passes with the appellant's employees. The learned judge accepted this contention and therefore ignored the documents.

For ourselves we fail to find any evidence which justifies the course of action taken by the learned judge. The respondent led no evidence at all stating that the removal passes were false.

Four witnesses, namely PW1 (the respondent himself), PW4, DW1 and DW2 gave evidence on the delivery orders and removal passes. From these evidence a conclusion can be drawn that the delivery orders were prepared by the respondent's clerk, whilst the removal passes were prepared by the forest guard on duty and that the appellant's employee was not at all involved in the preparation of these documents. The forest guard measured the logs, wrote the measurements on the passes and gave them to the respondent's clerk, whilst the respondent's clerk in turn wrote the delivery orders by making note of the particulars recorded on the passes, i.e. the particulars as to the measurements of the logs, the licence number and the amount of duty paid. The clerk used the removal passes to enable the logs to be taken out of the scheme. Copies of the passes and the delivery orders were later given to the appellant for accounting purposes. It thus could be seen that the appellant's employee took no part at all in the preparation of these documents, as those were strictly the affairs of the forest guard and the respondent's clerk. We fail therefore to see any collusion between the appellant and the forest guard.

Further from the evidence of the respondent and PW4, one Bahari, the clerk who prepared the delivery

orders could have been no other person than the respondent's own son. If such was the case, it is even more unlikely that the forest guard would have given false passes and untrue particulars to the clerk for the purpose of writing the delivery orders.

Counsel for the respondent laboured hard to prove the falsity of the removal passes. The learned judge accepted his submission and held that the documents were false for no other reason than a possibility that the removal passes might be false. The possibility came out in the cross-examination of DW1, the appellant's Secretary and Financial Controller and DW3, the District Forest Officer, Temerloh at the material time. DW1 said that it was possible for the appellant's officers and the Forest Department officials to be in collusion in that the logs were taken out of the scheme without removal passes; but as far as he was aware there was no instance of such collusion. DW3 said that it was possible for the logs to be taken into the appellant's sawmill without the knowledge of the forest checking station. But as far as he was concerned he received no report that logs were taken out without removal passes being issued. In his view this is an impossibility. It was on this possibility that counsel based his submission of falsity of the removal passes and the judge accepted it. In our view this is not evidence upon which a finding of falsehood could be made. The witnesses, DW1 and DW3 were doing no more than giving a true and honest answer when they said that there was a possibility, but as far as they were concerned, they were not aware of any fraudulent practices. Such answer has no bearing whatsoever upon the determination of fact which the court was called upon to make. It is not an evidence of fact, but a mere hypothesis which should be disregarded.

In any case the respondent and his witness never disputed the genuineness of the delivery orders. Is it therefore proper for the court to make such a vital finding on mere ground of possibility? The court is only concerned with probability and improbability and not with possibility or impossibility. Possibility belongs to the realm of hypothesis, as many things are possible, whereas probability and improbability have to be based on facts and evidence. It is the probability and improbability that is the basis of proof and disproof as defined in section 3 of the Evidence Act. A fact is said to be proved, "when after considering the matters before it, the court either believes it to exist or considers its existence so *probable* (not possible) that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists" (the brackets used are ours) and a fact is said to be disproved, "when after considering the matters before it, the court either believes that it does not exist or considers its non-existence so *probable* that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist."

It is true that the author of the removal passes, Forest Guard Baharuddin bin Ghazali was not called to give evidence. But his absence does not mean nor does it give rise to any inference that the passes written by him were false. Neither the respondent

- A himself nor anyone of his witnesses ever said in their evidence that the documents were false. Further the fact that the passes and the delivery orders were prepared almost at the same time by the forest guard and the respondent's own clerk, completely eliminates the chances of forgery. As the removal passes are public documents under sections 74 and 78 of the Evidence Act, the absence of their author from giving evidence does not in any way affect their admissibility.

Conclusion

- Finally we are of the opinion, however, the conclusion reached by the learned judge is not justified. P3 is not admissible as well as unreliable and incomprehensible. The tonnage written therein far exceeded 700 tons, which the respondent claimed to have been stolen by the appellant. No explanation thereto was ever given by the respondent. These defects are quite apart from its inadmissibility, which we rule accordingly. The respondent's own evidence shows that the theft of his timber occurred before he was requested to stop work, as the reason for the request was to enable investigation to be carried out into the suspected theft of timber in scheme 20 block A, which is the respondent's own area. The letter by his solicitor completely contradicts his own evidence regarding what the appellant is alleged to have removed. Further the respondent's letters to Encik Ghaffar bin Baba did not deal with the theft of his timber logs which were piled at the log yard, but relates to a general allegation that he sustained a loss of \$110,000 because the appellant cut and sold the respondent's timber and therefore as a settlement the appellant should give him a new logging right in scheme 22. These circumstances are sufficiently cogent to show that at the material time the respondent had not had piled up at his yard 700 tons of felled timber. Thus there could not be any object of the tort of conversion.

- We are also of the opinion that no conclusion could justifiably be reached that the appellant removed the respondent's timber. The inherent contradictions and improbability of his own testimony and the cogency of P4 and D5 in respect of which we are of the opinion that there was no collusion at all in their preparation, despite the fact that neither the author of P4 nor that of D5 was called to testify by either side, all go to disprove the respondent's case. In conclusion we hold that the respondent failed to establish his case of conversion against the appellant.

Counterclaim

- As regards the counterclaim, the appellant relied upon a bundle of documents referred to as B29 (and also known as (B1-10)). These were prepared by the appellant's checking clerk who was not called to give evidence. These documents are a record of royalty calculations based on the quantities of logs mentioned in the delivery orders, P4. There is a great deal of evidence given by DW1 and DW2 showing that B29 were really documents kept in the regular course of business of the appellant, and therefore should have been admitted under sections 32(b) and 34 of the Evidence Act.

However, B29 are a non agreed bundle of docu-

ments. Although the notes of evidence contain several references to these exhibits, there is nothing in the records which showed that the documents were tendered and marked as exhibits. We have seen B29 or (B1-10) which are in the possession of the trial court. These are not original copies but merely photostat copies. Thus in the absence of the original documents, and the lack of explanation as to their disappearance the photostat copies could not be admitted. Hence B29 are not admissible and with their inadmissibility the appellant's counterclaim remain unproved. We therefore agree with the conclusion of the learned judge in rejecting this counterclaim.

Observation

The records of appeal in this case consist of five fat volumes, each weighing almost two kilos. These records could have been reduced to a relatively small volume. The delivery orders which occupy more than half of the first volumes and the forest removal passes which were reproduced in the other four volumes could have been dispensed with, as we could always be invited to see the original exhibits tendered in court. All that is necessary is to provide a list of those documents in a tabulated form giving all the necessary particulars. If this had been done a great deal of time and money would have been saved and we would certainly have been spared of carrying these heavy but otherwise quite empty records. Perhaps it behoves those responsible for the preparation of records to use a little discretion to decide what should be included and excluded from the records. This is not the first time this court has to make this sort of remarks. Similar comments were expressed by Chang Min Tat F.J. when delivering the court's judgment in *Ooi Soon Eng v. Ng Kee Lin*.⁽³⁾ In this connection we would like to draw the attention of those responsible for preparing records of appeal to take note of the observations of their Lordships of the Privy Council in *Chow Yee Wah & Anor. v. Choo Ah Pat*⁽⁴⁾ so that unnecessary time and money would be saved.

Judgment

In view of the could-not-careless manner in which these records were prepared, we feel that the cost of reproducing the delivery orders P4 and Forest removal passes D5 should be borne by the appellant so that its entitlement to cost before us is reduced by the cost of their preparation and inclusion in the appeal records. Finally we allow the appellant's appeal against the order that it pays the respondent a sum of \$110,000 plus interest at 6% per annum; and dismiss its appeal against the order rejecting its counterclaim of \$18,862.25. We confirm that its counterclaim of \$5,807 plus interest as ordered by the court below stands. The appellant is entitled to the cost in the court below and before us but reduced by the sum representing the cost of preparing and including P4 and D5 in the records of appeal.

Order accordingly.

Solicitors: Zain & Co.; Malek & Joseph Au.

TIO CHEE HING & ORS. v. GOVERNMENT OF SABAH

[F.C. (Lee Hm Hoe C.J. (Borneo), Chang Min Tat & Syed Othman F.J.) September 8 & October 21, 1988]

[Kota Kinabalu — Federal Court Civil Appeal
No. 252 of 1979]

Practice and Procedure — Claim against Government — Limitation — Application to strike out statement of claim on ground that claim statute-barred — No defence entered — R.S.C. 1957, O. 25 r. 4 — Government Proceedings Ordinance, 1956 — Public Authorities Protection Act, 1965, s. 4.

Government Proceedings — Limitation — Statement of claim.

Land Law — Lease by Government — Arrears of rent — Sale of land to recover arrears.

In 1962 the Government of the Colony of North Borneo had leased 851 acres to certain persons subject to a development plan. The lease was transferred to the Southern Estates Ltd., the 2nd appellants. The rent fell into arrears and the Government sought to sell the land to recover the arrears. The original lessees and the transferee thereupon filed a claim for damages against the Government of Sabah alleging breach of an agreement by the Government of the Colony of North Borneo to lease a further 2430 acres to them. They also sought a stay of the sale of the 851 acres until the determination of their claim for damages. The Government of Sabah did not enter appearance or file a defence but applied to strike out the statement of claim on the ground *inter alia* that the claim was statute-barred. The learned trial judge held that the claim was statute-barred and he dismissed the claim for damages. The appellants appealed.

Held, dismissing the appeal: (1) the appellants had not shown that the Government had promised to grant the whole of the 3280 acres applied for by the lessees;

(2) in any event, the appellants' claim was clearly statute-barred and not maintainable against a defence that relied on limitation;

(3) no reasons were adduced for the stay of execution of the sale of the land and the application was rightly refused.

Cases referred to:-

- (1) *Murray v. Secretary of State for India* English & Empire Digest vol. 11 paragraph 375; [1931] W.N. 91.
- (2) *Dismore v. Milton* [1938] 3 All E.R. 762.
- (3) *Riches v. Director of Public Prosecutions* [1973] 2 All E.R. 935.

FEDERAL COURT.

G.T.S. Sidhu for the appellants.

Stephen Foo Kiat Shin (Deputy State Attorney-General) for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): In this action, the appellants sued the Government of Sabah for the loss of income from a piece of land of area 3280 acres which they quantified at \$44 millions odd or alternatively for \$13.2 million for the value of the land as a coconut plantation and the value of the timber thereon. With respect to the draftsman of the statement of claim, it must be said that the arithmetics of either of these two alternative heads of claim are not easy to follow from the figures given.

The language used in the statement of claim is also, with respect, so verbose and mixed that it becomes necessary to sort out the wheat from the chaff. This much, however, is clear from the statement of claim.